

## Comment

# European Communities – Customs Classification of Frozen Boneless Chicken Cuts (DS269/DS286)

## Prepared for the ALI Project on the Case Law of the WTO

NIALL MEAGHER

Senior Counsel, Advisory Centre on WTO Law (ACWL), Geneva

### 1. Introduction

This brief comment addresses several, but not all, of the points made in the paper by Robert Howse and Henrik Horn on the WTO Panel and Appellate Body reports in *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*.<sup>1</sup>

The *EC–Chicken Cuts* case involved a not uncommon situation, in which a WTO Member made tariff concessions in multilateral trade negotiations and subsequently found that trade gravitated towards products benefiting from lower tariffs. The WTO Member then attempted to address the situation by changing its practice of classification of one such product to subject that product to a higher tariff. While it may be frustrating to the importing Member, as a practical matter it seems inevitable that commercial interests will always gravitate towards the lowest-cost method of trading their goods across international boundaries. In this case, the European Communities (the ‘EC’) departed from an established practice of classifying imported chicken cuts that had been treated with salt under a

The views expressed in this comment, as well as any errors, are those of the author alone. I would like to thank Petros Mavroidis, Henrik Horn, and The American Law Institute (ALI) for inviting me to participate in this project and to provide this comment.

<sup>1</sup> Appellate Body Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, and Corr.1, adopted 27 September 2005 (hereafter ‘Appellate Body Report’), modifying Panel Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts, Complaint by Brazil*, WT/DS269/R, adopted 27 September 2005, and Panel Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts, Complaint by Thailand*, WT/DS286/R, adopted 27 September 2005 (the latter cited to hereafter as ‘Panel Report’).

lower-tariff heading (02.10, covering ‘meat ... salted ...’) and began to classify the increasing volume of such imports under a higher-tariff heading (02.07, covering ‘fresh, chilled or frozen’ poultry).

A threshold question in disputes about the tariff treatment of imports such as *EC – Chicken Cuts*, therefore, is how reviewing WTO Panels should frame the issue: in making classification decisions, are WTO Members bound to respect strictly the language of their concessions, or may they reclassify goods in order to protect their own understanding of what they intended by their concessions? It is important to approach this issue clearly: to describe the original classification of the goods as an ‘error’ by the importing Member, would suggest that the importing Members have broad authority to remedy such ‘errors’ by changing the classification of goods. On the other hand, to suggest that importing Members have limited authority to review the classification of goods in light of changing trading patterns and to prevent improper classification might undermine the mutual benefit of concessions and discourage WTO Members from continuing to make further tariff concessions.

This issue arose in the dispute in the form of determining the ‘object and purpose’ of the ‘treaty’ within the meaning of Article 31(1) of the *Vienna Convention on the Law of Treaties* (the ‘Vienna Convention’), which serves as the departure point in interpreting the WTO Agreements. The EC had argued that the Panel had improperly relied on the ‘expansion of trade’ as an object and purpose of tariff concessions of WTO Members.<sup>2</sup> The Appellate Body found that the Panel had properly construed the object and purpose of the WTO Agreements generally to include ‘the security and predictability of “the reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade”’.<sup>3</sup> This emphasis on ‘security and predictability’ strikes a proper balance between the approaches described above by focusing on a strict interpretation of the text of the tariff concession itself to ensure that the importing Member’s trading partners may benefit from the tariff concession in question, while still permitting importing Members to ensure that their concessions are not abused through the misclassification of goods.

## 2. The WTO and the WCO

I would disagree with the authors’ description of this dispute as primarily one of customs classification rather than treaty interpretation. As the authors note, it is well established under WTO jurisprudence that WTO Members’ schedules of tariff concessions form part of the WTO Agreements and may be the subject of WTO dispute settlement proceedings in the same manner as any provision of the so-called ‘covered’ agreements. Thus, the issue of the correct tariff on imports

<sup>2</sup> Appellate Body Report, para. 242.

<sup>3</sup> Ibid., para. 243, quoting Panel Report, para. 7.318.

of chicken cuts to the EC is as much a question of WTO law as, for example, the proper interpretation of the prohibition on export subsidies. In these circumstances, while acknowledging the broader issue of the ‘fragmentation’ of international law mentioned by the authors, I do not see how a WTO Panel could decline jurisdiction or formally defer its jurisdiction on this issue to the WCO dispute resolution process. Any problem of fragmentation exists not by hazard but by the choice of sovereign states to create discrete bodies to address particular issues. Any confusion between the jurisdictions of those bodies must be resolved by the sovereign states, not by the bodies themselves declining to complete the tasks assigned to them.

### 3. Interpretative issues

Article 31 of the Vienna Convention provides that treaties are to be interpreted in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of the treaty’s object and purpose. Article 31.3(b) provides that together with the context of the provision, the interpreter shall take into account ‘any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation’. Three aspects of the Panel’s and Appellate Body’s application of this interpretative approach deserve mention.

First, the authors correctly observe that the Panel framed the issue before it as whether the chicken cuts at issue were ‘salted’ within the meaning of, and therefore properly classifiable under, tariff heading 02.10, without separately considering whether the chicken cuts might also fall within the ‘ordinary meaning’ of tariff heading 02.07. By framing the issue in this manner, the Panel avoided applying WCO rules of interpretation that apply where products are *prima facie* classifiable under two tariff headings. While it is possible that the Panel’s analysis may have been better if it had considered that the chicken cuts were *prima facie* classifiable under both headings, it is by no means clear that the outcome would have been any different. In any event, as the authors note, the parties presented the issue to the Panel in a manner that precluded this approach, agreeing that the chicken cuts were not *prima facie* classifiable under both headings and that, if they were not properly classifiable under heading 02.10, the EC was permitted to classify them under the higher-tariff heading 02.07. Absent extenuating circumstances, the Panel is constrained to follow the parties’ agreement on and explanation of the issue before it.

Second, in interpreting the ordinary meaning of the term ‘salted’, the Panel did not content itself, as many Panels frequently do, with looking at the Oxford English Dictionary meaning of the term. The Panel stated that it was necessary to ‘test the appropriateness of those dictionary definitions against the factual context in which the concession in question exists’ and that the ‘factual context’ could include ‘aspects associated with the physical characteristics of the products at

issue'.<sup>4</sup> On appeal, the Appellate Body recalled that dictionaries are no more than a 'useful starting point' for interpretation; the ordinary meaning of a term is to be determined according to the particular circumstances of each case.<sup>5</sup> The Appellate Body noted that the Panel's term 'factual context' does not appear in the Vienna Convention, but stated that it did not consider that the Panel was incorrect to look at the elements it considered to be 'factual context' in trying to derive the ordinary meaning of the term 'salted'.<sup>6</sup> Although perhaps not perfectly articulated, the Panel's effort to look for 'ordinary' meanings in 'ordinary' sources other than the Oxford dictionary is to be commended. As the limitations of dictionary definitions become evident in future cases, it may be expected that Panels will continue to look beyond dictionaries to other, perhaps more practical, sources in identifying the 'ordinary meaning'. The Appellate Body's description of the interpretative process as a 'holistic exercise that should not be mechanically subdivided into rigid components' should facilitate this.<sup>7</sup>

Third, regarding the Panel's and Appellate Body's analysis of the 'subsequent practice' provision of Article 31.3(b) of the Vienna Convention, Howse and Horn suggest that the silence of other WTO Members cannot be considered as assent to that practice. I would go a little further. In the present case, the EC's practice had changed, and the issue before the Panel was, in effect, whether the former or latter practice was WTO consistent. In such circumstances, where the WTO consistency of the defending Member's practice is itself the issue, it seems difficult to rely on any aspect of that Member's practice, in itself, as evidence of the WTO consistency of either the Member's former or latter practice.

#### 4. GATT Article X

The authors suggest that the case should properly have been argued under GATT Article X, rather than GATT Article II. GATT Article X: 3(a) provides that WTO Members shall 'administer in a uniform, impartial and reasonable manner' all of their laws and regulations affecting, *inter alia*, customs classification. In their view, the EC's reclassification of chicken cuts was not inconsistent with GATT Article II, but the EC's failure to explain its understanding of its concession constituted a failure to administer its laws reasonably within the meaning of Article X: 3(a).

As a practical matter, however, GATT Article X: 3(a) would not have been much use to the complainants in this case. Leaving aside the question of any bias in the EC's decisionmaking *process* (and none was alleged in the case), it is not inconsistent *per se* with Article X: 3(a) for the EC to review the tariff classification of imported goods or to make decisions that change the tariff classification of

<sup>4</sup> Panel Report, para. 7.105.

<sup>5</sup> Appellate Body Report, para. 175.

<sup>6</sup> *Ibid.*, para. 176.

<sup>7</sup> *Ibid.*

those goods. Thus, the question of whether the EC uniformly and reasonably administered its customs laws in this case would turn on the issue of whether the EC reached a reasonable conclusion in its regulation changing the classification of chicken cuts.

This is, in other words, the same issue presented by the complainants in their claim under GATT Article II. Thus, a reviewing WTO Panel probably could not resolve a claim under Article X:3(a) without first considering the issue presented by a claim under GATT Article II and, once it had done so, the Panel would be quite likely to exercise judicial economy with respect to the further claim under GATT Article X:3(a). Also, from the complainant's point of view, a ruling under GATT Article II would essentially establish that the reclassification of chicken cuts was WTO-inconsistent. This would be much more valuable in terms of the EC's implementation than a ruling under GATT Article X:3(a), which would merely establish that there was a WTO-inconsistency in the EC's decisionmaking process. Such a finding may be of no practical benefit to the exporters: on implementation, the EC would be able to continue to classify the chicken under the higher-tariff heading, but would simply have to explain its process and rationale more thoroughly.